

IN THE MATTER OF	:	BEFORE THE
DOUG PARKINSON	:	HOWARD COUNTY
T/A ANTHONY SYLVAN POOLS	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 07-003V

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DECISION AND ORDER

On March 26, 2007, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of Doug Parkinson, Petitioner, trading as Anthony Sylvan Pools, for an after the fact variance to reduce the 10-foot side setback to 6 feet for swimming pool equipment located in an RR-DEO (Rural Residential-Density Exchange Option) Zoning District, filed pursuant to Section 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. I viewed the property as required by the Hearing Examiner Rules of Procedure.

The property owner, Susan Stasiewicz, testified in support of the petition. Christopher Carter and Paulette Carter, residents of 7245 Preservation Court, appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the evidence presented at the hearing, I find as follows:

1. The subject property, known as 7241 Preservation Court, is located in the 5th Election District on the west side of the Preservation Court cul-de-sac in Fulton (the "Property"). It is Lot #

13 in the Pindell Woods subdivision and is approximately 160 feet south of the cul-de-sac terminus. The Property is identified on Tax Map 41, Grid 8, as Parcel 274.

2. The Property is a rectangular-shaped lot consisting of about 0.918 acres, or 40,002 square feet. The lot has about 133 feet of frontage on Preservation Court and is about 300 feet deep. It is improved with a two-story detached dwelling about 40 feet wide and 35 feet deep. The house is located about 180 feet from Preservation Court, about 85 feet from the rear lot line, about 30 feet from the south side lot line, and 11 feet from the north side lot line.

The house is accessed from a paved driveway leading to a multi-car, side-loading attached garage at the south side of the house. The property has a moderate upward slope from south to north and is lightly wooded near the rear property line. A new well is located behind the house and the property frontage is used in part as a septic field.

Located to the rear and built along the same 11-foot side line as the north side of the house is a rectangular, in-ground swimming pool, its western edge about 19 feet from the rear property line. To its south is a small circular spa. The swimming pool equipment is 40-50 feet from the perimeter of the pool and is located near the northwest corner of the house and four feet into the side setback line.

3. The petitioner, the swimming pool contractor, is requesting a variance for the existing swimming pool equipment. Mr. Parkinson testified that the variance would cause the equipment to encroach 4 feet into the north side setback line.

4. Vicinal properties are also zoned RR-DEO and the adjacent properties along Preservation Court are part of Pindell Woods. The size of the property owner's house is typical of those in Pindell Woods. The property to the west is Lot 12 of the Simpson Woods subdivision, which is improved by a two-story, frame, single-family detached dwelling.

5. An aerial photograph included with the Department and Planning and Zoning's ("DPZ") comments indicates the subdivision properties on the west side of Preservation Court are similar in size, property frontage, width, and depth.

6. In the appeal petition, Mr. Parkinson stated the southern side was too severely sloped for the pool equipment, the slope having a 6-foot grade change from the south side to the north side and that this topographical feature caused practical difficulties in complying with the side setback.

7. The petition also stated the requested variance is the minimum necessary to afford relief from the side setback because the location involved the least amount of digging and trenching and minimized the movement of electrical lines.

8. Mr. Parkinson testified that the swimming pool equipment was originally to have been located to the pool's south, but that it was moved to its present location when a new well had to be dug. He stated the pool equipment had to be kept within one foot of the pool grade and that the grade could not run up. He further testified that the property owner did not want to move any trees for the equipment and that the location was logical because it was a short utilities run from the meter to the equipment and, thus, a good spot for all the utilities.

9. DPZ's comments and Protestants' Exhibit 2 demonstrate that the equipment is actually located on the Carters' property.

10. The swimming pool site plan includes a hand-drawn notation showing the pool equipment location on the adjacent property.

11. Protestants' Exhibit 1 shows the pool and spa under construction. The grading in this section appears generally level. Protestants' Exhibit 2 shows the pool equipment located on a slope

that inclines very moderately upward toward the pool, with a more pronounced downward slope on the Carters' property.

12. Mrs. Carter testified that the pool equipment noise was very bothersome because it was just beyond their bedroom, that the equipment was visually unappealing, and that they had to look at it every time they drove up their driveway.

CONCLUSIONS OF LAW

The standards for variances are contained in Section 130.B.2.a of the Regulations. That section provides that a variance may be granted only if all of the following determinations are made:

(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.

(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.

(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.

(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.

Based upon the foregoing Findings of Fact, and for the reasons stated below, I find the requested variance does not comply with Section 130.B.2.a(1) and (3) and therefore must be denied.

1. The first criterion for a variance is that there must be some unique physical condition of the property, e.g., irregularity of shape, narrowness, shallowness, or peculiar topography that

results in a practical difficulty in complying with the particular bulk zoning regulation. Section 130.B.2(a)(1). This test involves a two-step process. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A “practical difficulty” is shown when the strict letter of the zoning regulation would “unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.” *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

2. With respect to the first prong of the variance test, the Maryland courts have defined “uniqueness” thusly:

“In the zoning context, the ‘unique’ aspect of a variance requirement *does not refer to the extent of improvements upon the property*, or upon neighboring property. ‘Uniqueness’ of a property for zoning purposes requires that the subject property have an inherent characteristic not shared by other properties in the area, i.e., its shape, topography, subsurface condition, environmental factors, historical significance, access or non-access to navigable waters, practical restrictions imposed by abutting properties (such as obstructions) or other similar restrictions. In respect to structures, it would relate to characteristics as unusual architectural aspects and bearing or party walls.”

North v. St. Mary’s County, 99 Md. App. 502, 514, 638 A.2d 1175 (1994)(italics added).

3. In this case, the Petitioner has not shown that the Property is in any way unique such that the side setback requirement will disproportionately impact it. The Property is generally the same size when compared to others in the vicinity and its overall size does not pose a practical difficulty in complying with the side setback requirement.

4. The Petitioner argues that the need to drill a new well caused the equipment to be located within the setback. However, the Petitioner also testified that the best location for the

equipment was at its present location because it was a short utilities run from the meter to the equipment and that it was a good spot for all the utilities.

5. Although the Petitioner testified that the 6-foot slope precluded locating the equipment elsewhere on the property, the swimming pool and spa appear to be level, which compels the conclusion that the equipment can be relocated and still meet the one-foot grade requirement through additional grading. Clearly, then, it is not the shape or other physical condition of the Property that gives rise to the Petitioner's difficulty in complying with the side setback requirement. Instead, as the Petitioner testified, the most cogent explanation for the variance request is an interest in minimizing the economic cost of locating the equipment elsewhere. Moreover, the variance application indicates there is ample room to locate the equipment in a manner that meets any engineering requirements and complies with the side setback requirement.

6. Consequently, the Petitioner has not produced sufficient evidence to pass the first prong of the variance test; that is, he has not shown the Property has any unusual or unique characteristic to cause the side setback restriction to disproportionately impact upon it.

7. In addition, the Petitioner's request does not pass the second prong. The Petitioner is not unreasonably prevented from making a permitted use of the Property because the pool equipment may be located elsewhere on the property and still comply with the side setback requirement. For these reasons, the variance request fails to comply with Section 130.B.2.a(1).

8. Section 130.B.2.a(3) of the Zoning Regulations requires that any practical difficulty in complying with the setback requirement may not have been created by the owner. Most often, this "self-created hardship" rule comes into play when the owner has already constructed something on the property that violates the applicable zoning regulations, then requests relief from the regulation in order to avoid the hardship of removing the structure. See, e.g., *Cromwell*

v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995); *Evans v Shore Communications*, 112 Md. App. 284, 685 A.2d 4554 (1996); and *Ad+Soil, Inc. v. County Commissioners of Queen Anne's County*, 307 Md. 307, 513 A.2d 893 (1986). Because the practical difficulty in these cases arose from actions of the Petitioner and landowner, and not as a result of the disproportionate impact of the zoning regulations on the particular property, the cases failed the test for variances.¹

This is precisely the situation in this case. The Maryland courts have made it clear that whether the hardship was inflicted intentionally or unintentionally is irrelevant; if it was the result of the owner's action or that of a predecessor in title, the variance must be denied. *Salisbury Board of Zoning Appeals v. Bounds*, 240 Md. 547, 214 A.2d 810 (1965); *Cromwell*, 651 A.2d at 441.

While I recognize that correcting the encroachment may be a greater financial undertaking than if the Petitioner were allowed to maintain the equipment within the setback, I may not take the cost of the work into consideration. "Hardship is not demonstrated by economic loss alone. It must be tied to the special circumstances [of the land], none of which have been proven here. Every person requesting a variance can indicate some economic loss. To allow a variance anytime any economic loss is alleged would make a mockery of the zoning program." *Cromwell v. Ward*, 102 Md. App. 691, 715, 651 A.2d 424 (1995), quoting *Xanthos v. Board of Adjustment*, 685 P.2d 1032, 1036-37 (Utah 1984).

The courts have consistently held that any hardship must relate to the land, and not to the personal circumstances of the owner. See 3 Robert M. Anderson, *American Law of Zoning*, Section 18.30 (2d ed.). In this case, the practical difficulty in complying with the 10-foot side

¹ The self-created hardship rule, while listed as the third variance criteria in the Section 130.B.2.a, is actually a complement to the first criterion. If the hardship is self-created, then it is not the result of a unique physical condition of the land and therefore fails the test of Section 130.B.2.a(1) as well.

setback requirement is personal to the Petitioner and does not relate to the land itself. Consequently, the petition does not meet the requirements of Section 130.B.2(3).

Conclusion

It is well established in Maryland law that any practical difficulty must relate to the land, and not to the personal convenience of the particular owner of the land. *Cromwell*, id. While it may be desirable for the Petitioner to be able to retain the equipment in its present location, it is not the role of zoning, nor should it be, to accommodate the personal wants or circumstances of each property owner. Rather, the purpose of zoning is to promote the orderly development of land through the imposition of uniform regulations and standards. Variances to these standards are therefore to be sparingly granted, and only under exceptional circumstances. *Cromwell*, 651 A.2d at 430.

Simply put, if I were to grant a variance to this Petitioner to accommodate the owners' personal desires and circumstances, then I must do so for every property owner who is similarly situated. Once granted, a variance is permanent and irreversible. Under such a system, variances would become the rule, and the Zoning Regulations would be rendered meaningless.

Moreover, "it is not the purpose of variance procedures to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements. When administrative entities such as zoning authorities take it upon themselves to ignore the provisions of the statutes enacted by the legislative branch of government, they substitute their policies for those of the policymakers. That is improper." Id. at 441.

The Petitioner in this case has not presented sufficient evidence to show that exceptional circumstances exist to warrant the grant of a variance to the setback requirements. Consequently, I am compelled to deny the request.

ORDER

Based upon the foregoing, it is this 2nd day of April, 2007, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Doug Parkinson for a variance to reduce the required 10-foot side setback from a residential district for pool equipment is **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.